STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	No. 307325 Leelanau Circuit Court
DAVID CHARLES BOUWMAN, Defendant-Appellant.	LC No. 11-001719-FH

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*)

I respectfully dissent and would remand for a *Ginther*[1] hearing for the trial court to determine whether defendant's trial counsel was ineffective for failing to object to evidence offered by the prosecution in support of the claim that defendant drugged complainant.[2] Defendant was convicted of third-degree criminal sexual conduct, MCL 750.520(d)(1)(c) (actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless). The trial court sentenced defendant to 20 to 180 months in prison.

Complainant was an overnight guest at defendant's vacation home. It is undisputed that the two men drank liberally over the course of several hours during the evening. Complainant testified that defendant encouraged him to drink, but agreed that he did not force him to do so. Complainant testified that he either passed out or fell asleep. At approximately 4:30 a.m., he awoke to discover defendant performing fellatio on him. He testified that he struck defendant and ordered him to stop. Michigan State Police DNA testing of swabs taken from complainant's penis that morning revealed defendant's saliva. Defendant denied any sexual contact with complainant and presented testimony from a serologist, who stated that testing he conducted did not reveal the presence of any saliva on the swab of complainant's penis. Defendant also

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] I concur with the majority's conclusions on the other issues.

asserted that complainant accused him of sexual assault in order to extort money[3] and that if his saliva was on complainant's penis, complainant must have placed it there himself after removing some while defendant slept.

Both men testified that during the course of the evening, complainant stated that he was not feeling well and that defendant gave him a pill that he said was ibuprofen. At trial, the prosecution repeatedly suggested that the drug defendant gave complainant was in fact a prescription or illegal drug intended to render complainant helpless so that defendant could sexually assault him. Complainant himself could not say what the pill was, nor even if he took it.

The defense in this case was not inconsistent with the two men voluntarily consuming significant amounts of alcohol. However, if the jury concluded that defendant surreptitiously gave complainant a prescription or illegal drug in order to render him helpless, then it is difficult, if not impossible, to imagine how they could fail to convict the defendant. If defendant lied to complainant about what drug he gave him and purposely deceived complainant into taking a type of "date-rape drug," there is no reasonable explanation other than that he intended to render complainant helpless in order to assault him.

According to the evidence at trial, when complainant came to the hospital emergency room the morning after the assault, blood and urine samples were taken and tested for the presence of alcohol and drugs. An emergency room nurse testified that the tests revealed that, at 9:44 a.m., between five and eight hours since his last drink, complainant's blood alcohol level was .12, one and one-half times the legal limit. By contrast, no drugs were found in complainant's blood sample. At the hospital, the blood was tested for barbiturates, cannabis, cocaine, opiates, amphetamines and benzodiazepines.[4] The blood sample was then sent to the Mayo Clinic for further forensic testing. The Mayo Clinic lab tested for the presence of gamma-hydroxybutric acid (GHB, a "date-rape drug"), ketamine, alcohol, phencyclidine and methadone. Again, no drugs other than alcohol were present.

Despite the complete lack of objective medical evidence that complainant had drugs in his system other than alcohol, the prosecutor repeatedly theorized that defendant had secretly drugged complainant, but that the blood tests had somehow failed to detect it. Notably, no theory, let alone evidence, was offered to explain how this failure of testing in two separate labs might occur. Instead, the prosecution sought to support its theory through the "expert" opinion testimony of a police officer and an emergency room nurse. The record strongly suggests that neither of these opinions had sufficient foundation to be admitted either as expert opinion, or

[3] Defendant's wife testified that the complainant told her and her husband "get your checkbook out, think of a number big enough to keep me quiet." Complainant agreed that he told defendant "you better get your checkbook out."

[4] A common "date-rape drug," flunitrazepam, often referred to by its brand name, Rohypnol, is a benzodiazepine.

even lay opinion. See MRE 701-703. In my view, the failure to object to them fell below an objective standard of reasonableness.[5]

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id*.

The police officer testified that he administered field sobriety tests to complainant at the emergency room around the time that blood was drawn. When the officer began to testify to his interpretation of the results of the field sobriety tests, defense counsel objected, but only on the grounds that he had not received *notice* of this expert testimony. The prosecution responded that the testimony was reflected in the police report and that defense counsel therefore had sufficient notice.[6] After the objection was overruled, the officer gave detailed testimony concerning two field tests he administered to complainant, explaining both the means of administering the tests and his interpretation of the results.

The officer testified that one of the tests he administered was the horizontal gaze nystagmus (HGN) test. This is a test in which the officer observes the horizontal movement of the test subject's eyes for certain irregularities. The officer stated that the presence of such irregularities is consistent with alcohol intoxication. The use of this test and its admission in evidence has been approved by courts in Michigan and other jurisdictions. See, e.g., *People v Berger*, 217 Mich App 213, 217-218; 551 NW2d 421 (1996); *City of Fargo v McLaughlin*, 512 NW2d 700 (ND 1994). Of course, the HGN-test evidence was uncontroversial, as it was undisputed that complainant had consumed alcohol.

The officer testified that he then administered a second test called the vertical gaze nystagmus (VGN) test. He testified that the presence of irregularities in the vertical movements of a test subject's eyes indicates that the subject is under the intoxicating influence of *drugs*, not

[5] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[6] On appeal, defendant concedes that the objection on these grounds was properly overruled.

alcohol. This VGN test was repeatedly referred to by the prosecutor during trial as evidence that defendant drugged complainant.[7]

Contrary to the opinion of the officer and the statements of the prosecutor, this testimony completely mischaracterized the status and purpose of the VGN test. First, while the HGN test is admissible in Michigan, *Berger*, 217 Mich App at 217-218, no Michigan appellate court has ever approved admission of the VGN test or found it to be scientifically reliable under either the *Daubert*[8] or *Davis*/*Frye*[9] standards. Indeed, unlike the HGN test, which is considered admissible in many states, review of secondary literature, 117 ALR5th 491, §§ 1-8, indicates that the VGN test: (a) has only been held to meet the standards of scientific reliability in a handful of states, and then only when it is administered as a single test in a battery of twelve, see, e.g., *State v Bevan*, 235 Or App 533, 541-542; 233 P3d 819 (2010); (b) no state has held that the VGN test can distinguish between alcohol and drug intoxication, and; (c) no scientific study has ever suggested, let alone found, that the VGN test will be positive in cases of drug intoxication, but negative for alcohol intoxication. Moreover, the VGN is not included among the standard field sobriety testing protocols in the publications of the National Highway Traffic Safety Administration.[10]

In sum, the record is devoid of legal authority or foundational testimony to admit the officer's testimony regarding complainant's VGN test. Defense counsel's failure to object to its admission on substantive grounds cannot be considered a strategic decision. Moreover, the failure to at least object to the officer's explanation of what the test is capable of determining, i.e., "he was on drugs, not alcohol," cannot be justified on the basis of any reasonable trial strategy and, accordingly, fell below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

Both the doctor and the ER nurse that treated complainant also testified. The doctor was asked by the prosecutor whether it was possible that complainant had taken drugs despite the fact that both toxicology screens were negative. The doctor responded, "[I]f I get a test and I get an answer I trust the answer" and "a negative result is a negative result."

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[7] For example, in his opening statement, the prosecutor advised the jury that they would learn from the officer's testimony that "importantly, [the officer] conducted what's called a vertical gaze nystagmus. Vertical gaze nystagmus [the officer] will tell you is designed to determine whether or not somebody may be under the influence of something other than alcohol." The same point was made several times in closing arguments.

[8] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[9] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

[10] *Development of a Standardized Field Sobriety Test*, Appendix A: Standardized Field Sobriety Testing, available at http://www.nhtsa.gov/people/injury/alcohol/sfst/appendix_a.htm (accessed March 10, 2014).

The nurse initially testified that complainant requested a toxicology screen and "appeared to be under the influence of something and I didn't smell alcohol it wasn't consistent with alcohol." She also testified that "the way he behaved was more consistent with some other substance other than alcohol" and that she thought it was consistent with "some kind of [central nervous system] depressant."[11] On cross-examination, the nurse agreed that the toxicology tests were negative and stated that she was "not sure" whether the toxicology screens were able to detect trace amounts. Defense counsel did not object to the nurse offering her expert opinion that complainant was under the influence of drugs, not alcohol, despite the objective test results demonstrating precisely the opposite. Other than her testimony that the complainant "did not reek of alcohol," the nurse offered no factual basis, either in the behavior or examination of complainant, that indicated drug, rather than alcohol, intoxication. Neither did she claim any expertise in toxicology or testing error rates. Accordingly, trial counsel's failure to object to this portion of the nurse's testimony fell below an objective standard of reasonableness. *Id*.

These two failures to object on the part of defendant's trial counsel raise two questions. First, whether the trial court should have excluded the testimony if the proper objections had been raised. Based on the present record, the answer is yes. However, given that there was no objection, the prosecution must be given an opportunity to present any evidence and argument in response to the objections. Answering this question may require a *Daubert* hearing regarding VGN tests and additional foundational testimony from the nurse.

The second question is whether, if excluded, the absence of this evidence results in "a reasonable probability that the result of the proceedings would have been different." *Id*. The trial judge heard the testimony of complainant and defendant and certainly is in the best position to assess their relative credibility and, in light of that comparison and the other evidence, to determine whether there is a reasonable probability that the exclusion of the testimony would have resulted in defendant's acquittal.

Accordingly, I would remand for an evidentiary hearing or hearings concerning both the admissibility of the questionable testimony and the likelihood of acquittal were that testimony excluded.

I respectfully dissent.

/s/ Douglas B. Shapiro

[11] Ethanol, the active ingredient in alcoholic beverages, is itself a central nervous system depressant. *Stedman's Medical Dictionary, 28th Edition* (2006), 673-674.